FEB 10 1959
JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 694

ORBO THEATRE CORPORATION, *Petitioner*

v.

LOEW'S, INCORPORATED, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons For Granting The Writ	9
Argument	
I. The District Court Erred in Declining to Consider Petitioner's Right to An Availability of Less Than Twenty-One Days	10
II. The Courts Below Erred in Rejecting the Evidence Proffered by Homer Hoyt	11
Conclusion	12
Appendix	1a

TABLE OF AUTHORITIES

CASES:

Fanchon & Marco v. Paramount Pictures, Inc., U.S.D.C. Cal. 100 F. Supp. 84; aff'd 215 F2 167; cert. den. 348 U.S. 912; 75 S. Ct. 293, 99 L. Ed. 715	5
Gary Theatre Co. v. Columbia Pictures, (C.C.A. 7) 120 F2 891	5
Theatre Enterprises v. Paramount Film Dist. Corp., (C.A. 4) 201 F2 306; aff. 346 U.S. 537; 74 S. Ct. 257; 98 L. Ed. 273	5
United States v. E. I. Dupont De Nemours & Company) U.S.D.C., Del., 118 F. Supp. 41, aff'd 351 U.S. 77, 100 L. Ed. 1264, 76 S. Ct. 994	12

Page

United States v. J. I. Case Co., U.S.D.C. Minn. 101 F. Supp. 856 12

United States v. Paramount Pictures, et al., 334 U.S. 131; 68 S. Ct. 915; 92 L. Ed. 1260 ..... 2, 6, 9

STATUTES:

District of Columbia Code (1951 Ed.): Title 11 Sec. 306 ..... 2, 1a

Clayton Act: Act of October 15, 1914, c. 323 Sec. 4, 38 Stat. 731; 15 U.S.C.A. Sec. 15 ..... 2, 1a

Judicial Code: 28 U.S.C. Sec. 1254(1) 2

REFERENCES

References to "J.A. p. ——" are references to pages of the Joint Appendix filed in the United States Court of Appeals.

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Orbo Theatre Corporation, prays that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on November 13, 1958, which affirmed a judgment dismissing the complaint, after trial to the United

States District Court for the District of Columbia (Holtzoff, J.). Plaintiff's action was instituted under the anti-trust laws of the United States for an injunction and treble damages.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. The opinion of the District Court is reported in 156 F. Supp. 770 and is reproduced in the Joint Appendix, filed herewith, at pages 63-77.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958 and affirmed the Judgment of the United States District Court for the District of Columbia, entered on December 11, 1957. The jurisdiction of the United States District Court was invoked under the provisions of Title 11, Section 306 of the District of Columbia Code, and Section 4 of the Clayton Act (Act of October 15, 1914, c 323; 38 Stat. 731; 15 U.S.C.A. Section 15.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. In an action under the Sherman Act, wherein a motion picture exhibitor complains that a delayed availability is violative of this Court's decision in *United States* v. *Paramount Pictures, et al.*, 334 U.S. 131, may the Trial Court decline to consider reducing the clearance period on the ground that it may not substitute its judgment for the business judgment of distributors of film and first-run exhibitors?

2. May an expert witness, in such an action testify to his conclusions based on statistical data gathered

by means of a random survey conducted under his supervision?

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*.

STATEMENT

Petitioner is a Maryland corporation, doing business in Rockville, Maryland, where it operates a motion picture theatre known as the "Villa". The Villa opened for business on December 1, 1955, following extensive renovations of an old theatre—renovations which cost a little less than $98,000 (J.A. 79, 80, 82-83; Pltf's Exh. 3).

From the very beginning, the Villa, though fifteen miles from the center of Washington (J.A. 46) and, therefore, fifteen miles from the "first-run" houses served by the Respondents, was subjected to a twenty-one day clearance. Stated in non-trade language, this meant that feature films distributed by the Respondents were held back from the Petitioner's theatre until twenty-one days after they had finished playing at the comparatively few first-run theatres, all of which are in the general vicinity of F Street, Northwest (Stipulation of facts, J.A. 18-19).

Concededly, Petitioner's theatre is not the sole victim of the clearance pattern enforced by the Respondents. Once we leave the F Street area there is no theatre in the District of Columbia or Montgomery County which plays motion pictures earlier than twenty-one days after the close of the run at a first-run house (id. J.A. 19). Similarly, with the exception of

the theatre in Laurel, Maryland, all Prince George's County theatres are held back twenty-one days. Across the Potomac, there it a departure from this twenty-one day rule; in Alexandria, feature pictures generally open fourteen days after they close in the downtown Washington houses (See Appendix to Plaintiff's Trial Memorandum, J.A. 9-16, received as an unnumbered Exhibit, J.A. 98).*

This action went to trial on a pleading which alleged that the Respondents "by concerted action and agreement among themselves" and "by agreement between each defendant and 'first-run' theatres in the City of Washington" arbitrarily restricted the release of motion pictures to the Villa for minimum periods of twenty-one days after the close of the premiere showing. Such agreements, it was alleged, constitute unlawful restraints of trade in that they unreasonably deprived the Petitioner of the opportunity to exhibit newly produced motion pictures "in the area where Plaintiff's theatre is not in direct competition" with first-run theatres (J.A. 3-4). By way of relief, Petitioner prayed for an injunction ordering release of the Respondents' product simultaneously with the premiere exhibition in Washington, and damages.

The Trial Judge found the evidence insufficient to establish a horizontal conspiracy among the Respondents (J.A. 69-70) but deemed it necessary to

> "proceed to determine whether the clearance system of which the plaintiff complains constitutes a series of illegal restrictions." (J.A. 72)

This step was essential because the second aspect of the case involved the legality of the clearance agreements.

* This Appendix was prepared from the answers to Interrogatories (J.A. 300-353) in which Respondents stated the clearance periods and the terms of the clearance agreements.

between the distributors and the first-run houses, the agreements under which the Respondents agreed to hold back their product from the Villa.

Principally by reference to three cases which questioned the legality of the clearance agreements dealing with theatres in Baltimore, Los Angeles and Gary, Indiana (*Theatre Enterprises* v. *Paramount Film Dist. Corp.*, 201 F2 306, aff'd 346 U.S. 537; *Fanchon & Marco* v. *Paramount Pictures, Inc.*, 100 F. Supp. 84, aff'd 215 F2 167, cert. den., 348 U.S. 812; *Gary Theatre Co.* v. *Columbia Pictures*, 120 F2 891), the District Court concluded that the clearance over Petitioner's theatre was not unreasonable.

No mention was made of any competitive factors which would justify a twenty-one day clearance over the Villa and, more than that, the District Judge disclaimed authority to decide whether a clearance period less than twenty-one days was dictated by the facts. In the language of the Trial Judge (J.A. 75):

> "It may be argued with some degree of cogency that a fourteen day waiting period would be sufficient in the case at bar, because that is the limitation invoked as against theatres located in Alexandria Virginia. The Court may not, however, substitute its own judgment for the business judgment of the parties. All that it may determine is whether the negative covenants actually used are beyond the bounds of reasonable restrictions. It may not decide whether a lesser restraint might possibly be sufficient. The Court may not undertake to dicate to the management of business concerns how to conduct and operate their enterprises, but is confined to deciding whether what they are actually doing transcends the law."

Such a position is astonishing, for, under the rule of the principal decision in this field of litigation

(*United States* v. *Paramount Pictures, et al.*, 334 U.S. 131), clearance is not justified if there is no substantial competition between the first-run and subsequent run theatre. Secondarily, under the *Paramount* decision, the existence of some competition may justify some clearance but not the clearance in force.

Manifestly, the evidence offered the District Court a wide range for affirmative action. Admittedly, Alexandria theatres—about half as far from downtown Washington as Rockville—operate under fourteen days' clearance. If the Alexandria theatres do no competitive harm to the first-run houses, only some unusual explanation would demonstrate the need for any protection at all against the Villa.

When the Trial Judge asked one of the Respondents' witnesses, a circuit owner, to explain the circumstances of the difference between Alexandria and Montgomery County clearances, the answer was (J.A. 231):

> "Your Honor, I do not understand that myself. It has been the practice."

Others confessed that they had never made any special study of the competitive factor (J.A. 118, 123, 134, 161, 170, 181), or that they did not know what percentage of their customers at the first-run theatres came from Montgomery County (J.A. 273). Still another testified that the reason the Rockville availability could not be advanced was the anticipated pressure from all theatres between F Street and Rockville for a similar advance in run (J.A. 247-248).

On the record as it stood at the time of decision, there was sufficient room for a positive approach and affirmative relief; no reason founded on the facts was advanced for refusing to exercise authority.

As part of its case, Petitioner attempted to establish, affirmatively, that there was no substantial competition between the Villa and the F Street theatres. To demonstrate the point vividly, the Petitioner offered proof through Homer Hoyt, a market analyst and real estate economist. Mr. Hoyt's thirty-two years experience in the field qualified him as an expert and his qualifications were conceded (J.A. 140-141). Had the evidence, proffered through Mr. Hoyt, not been rejected, it would have established that of all annual movie attendances from among the movie-goers in Rockville, only 4.7 per cent of them were at downtown first-run houses (J.A. 151).

In advance of trial, Mr. Hoyt conducted a survey of the movie-going habits of the Rockville population by sampling

> "300 households containing over 1200 people, or 5 percent of the population of Rockville."

This sampling process began with the preparation of a questionnaire (J.A. 143; Pltf's Exh. 4).

Hoyt then instructed his associate, a member of the faculty of American University,

> "to take a random sample, sample each area in the city of Rockville, and to take one house out of every twenty."
>
> "Q. Was there any particular reason why you instructed her to make this a random sampling?"
>
> * * * * * *
>
> "* * * We wanted an absolutely scientific test according to approved methods of sampling so that there would be no bias in the results, that every area would be represented." (J.A. 144)

At this point, for all practical purposes, the proof came to a halt. From there on, the proceedings lapsed into arguments concerning admissibility and the essence of Mr. Hoyt's proposed testimony can only be gathered from an examination of the questionnaire (Pltf's Exh. 4) and the survey itself (Pltf's Exh. 5 for identification).

The questionnaire ranged over six subjects. The inquiries were directed to (a) the number and ages of people in the household, (b) where they worked, (c) where and how often they went to the movies, (d) how often they went "downtown", (e) shopping habits and (f) income bracket. True, the questionnaire covered a larger area than the percentage of downtown moviegoers but necessarily so; otherwise the witness would have been unable to explain and vouch for the conclusion that of "all movie attendances during the year, only 4.7% were to first-run movies." (J.A. 50)

His explanation would have been that "Rockville residents do not appear to be oriented Washingtonward" (J.A. 50), that most of the residents are young, in modest circumstances, and

> "for both parents to go to a downtown show takes a great deal of preparation. Baby sitters, their cost and availability, the time it takes to get downtown, the cost of the trip, parking difficulties and the greater length of time away from home. Many respondents offered the advice that they would go to the movies more often if good choices were available nearer home." (J.A. 51)

The evidence was excluded, for despite the concession of counsel for the defense that Hoyt was an expert in his field (J.A. 141)—and the Court's recogni-

tion of him as such (J.A. 142)—the Trial Judge cut off further proof on the ground that the expert was giving fact testimony in violation of the hearsay rule (J.A. 152-155).

On trial and in the Court of Appeals, the Petitioner's argument, in the main, was that Hoyt's proof was opinion evidence and that he, like all other experts, could testify to his conclusions regardless of the methods resorted to for assembly of the facts. On the other hand, Petitioner did press, in the Court of Appeals, the argument that economic surveys are admissible in anti-trust litigation to establish economic facts. On this record, the question of admissibility is squarely presented.

REASONS FOR GRANTING THE WRIT

1. This action was grounded in this Court's decision in *United States* v. *Paramount Pictures, et al.*, 334 U.S. 131. That decision was taken to mean 1) that where there is no substantial competition between a first run theatre and a subsequent-run theatre, there shall be no clearance and 2) that where there is substantial competition between the first and sub-run houses, there shall be only such clearance as may reasonably be needed to protect the distributor and first run operator.

If these two premises are correct, then, in each case, the Courts must examine the facts to determine 1) if any clearance is justified and 2) what clearance is justified. To permit them to deny their authority to explore the facts on the question of "lesser restraint", to use the words of the Trial Judge, is to permit them to emasculate the Paramount decision.

2. In at least two cases under the anti-trust laws, decided within the last eight years, economic surveys have been resorted to for the purpose of establishing the truth of the facts reported. The use of surveys in the business world as a method of establishing economic facts has become more and more common and, it is respectfully submitted, that the record in the case at bar presents a state of facts for decision on the question of the use of surveys in the Federal Courts and the limitations to be prescribed in respect of their reception in evidence.

ARGUMENT

I

The District Court Erred in Declining to Consider Petitioner's Right to An Availability of Less Than Twenty-One Days

Petitioner, in its pleading, sought the removal of all clearance over the Villa Theatre. That prayer for relief it believed to be justified. At the same time, however, it did not limit its position to one of all or nothing. The case was tried within the framework of the Paramount decision, *supra,* which enjoined the film distributors from maintaining

> "a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted." (334 U.S. 131, 147)

In the face of this, the overriding principle, it was the obligation of the Courts below to examine the facts and say, on the facts, that there should be no

clearance or, if the facts justified some clearance, to say precisely what the clearance should be. It was not for them to say, as the District Court did, that what was valid in Baltimore, Los Angeles and Gary was valid fifteen miles out of Washington.

Neither was it permissible for them to wash their hands of the matter and deny authority to "substitute (their) own judgment for the business judgment of the parties" to the clearance agreement. The busines judgment argument is thoroughly unsound; every contract in restraint of trade is dictated by the business judgment of those who make it and in every anti-trust case the Courts are called upon to inject their rulings in substitution of what the offenders have done.

The District Court should have examined the economic factors and on those factors alone decided the issue and determined precisely what clearance, if any, would be enforced in the future.

II

The Courts Below Erred in Rejecting the Evidence Proffered by Homer Hoyt

Homer Hoyt was offered as an expert witness who would have testified to the absence of substantial competition between the first-run houses in Washington and Petitioner's theatre in Rockville. This expert was shut off because his opinion generated from hearsay evidence.

Petitioner does not withdraw from the position taken below that an expert may offer an opinion drawn from unwitnessed facts; it urges, additionally, that the survey method, accepted as it is in the business world, should be accepted in the courts.

In two recent anti-trust cases, the District Courts have authorized the use of reports of surveys and questionnaires to establish the truth of the facts reported.

United States v. *J. I. Case Co.*, 101 F. Supp. 856;

United States v. *E. I. DuPont De Nemours & Company*, 118 F. Supp. 41, aff'd 351 U. S. 377.

On trial of the *Case* action, the District Court received in evidence, bulletins, dealer analysis reports and dealer questionnaires. The Government was permitted to introduce 78 such reports from a total of 12,000 dealers and the results of 108 of a total of 3,676 questionnaires.

In the *Du Pont* case, extensive surveys, studies by trade associations and reports of the defendant's salesmen were admitted on the issue of monopoly power allegedly exercised by the defendant.

New techniques for the development of facts in issue are not rejected by the Courts because they run counter to orthodox rules. Here, a new method has been developed and it is respectfully submitted that this Court should decide the extent to which and the circumstances in which it may be employed in the Federal Courts.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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